



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2006-10): INCAPACITY: REMOVAL OF TRUSTEE

TO: State Bar Office of Governmental Affairs

FROM: Barry Fitzpatrick, Chair, Executive Committee,
Peter Stern, Advisor, Executive Committee, and Chair, Incapacity Committee
Neil F. Horton, Member, Executive Committee, and Chair, HIPAA Work Group
Trusts and Estates Section, State Bar of California

DATE: August 1, 2005

RE: Legislative Proposal: Removal of Trustee Provisions, Probate Code §15642

SECTION CONTACTS:

Section Legislative Chair:	Section Contact:
Silvio Reggiardo III Downey Brand et al. LLP 555 Capitol Mall 10th Floor Sacramento, CA 95814 Tel: 916-441-0131 Fax: 916-441-4021 Email: sreggiardo@downeybrand.com	Neil F. Horton, Esq. Horton & Roberts, LLP 1901 Harrison Street, Suite 1500 Oakland, California 94612 Telephone: 510-452-2133 Fax: 510-452-2280 E-mail: neil@laweastbay.com

DATES OF APPROVAL:

Trusts and Estates Section Incapacity Subcommittee: March 14, 2005, unanimous vote
Trusts and Estates Section Executive Committee: March 19, 2005, unanimous vote

DIGEST:

Probate Code §15642(a) provides that a trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on a petition under §17200. Probate Code §15642(b) lists the grounds on which a court may remove a trustee.

Many trust instruments and trust forms provide for automatic removal on a certification by one or more physicians that a trustee is physically or mentally incapacitated. See *Drafting California Revocable Trusts* section 16.46 (4th ed. Cal CEB 2003). Because of federal regulations under

the Health Insurance Portability and Accountability Act (HIPAA)¹ and the Confidentiality of Medical Information Act,² physicians are likely to be increasingly unwilling to provide these certifications.

Many elderly persons use a revocable trust both as a will substitute and as a substitute for a conservatorship. Many elderly persons also name themselves as trustee. The problem of when a settlor-trustee no longer is fit to continue to serve as trustee is similar to the problem of when a person is no longer able to manage her or his own financial affairs and is in need of a conservator. In conservatorship proceedings, courts use the functional test of whether a person “is substantially unable to manage his or her own financial resources or resist fraud or undue influence....” Probate Code §1801(b).

Courts should be able to use the same functional test for trustee removal under §15642: whether a person is substantially unable to manage the trust’s financial resources or to resist fraud or undue influence. In determining whether a trustee is substantially unable to manage the trust’s financial resources, the proposed legislation requires the court to use the same analytical framework under Probate Code §§810 - 814 that it employs in other determinations of legal mental capacity.

In a conservatorship case, the burden of proof is clear and convincing evidence. Probate Code §1801(e). The burden of proof for trustee removal should continue to be preponderance of the evidence. Evidence Code §115. Being removed as a trustee does not carry the same collateral consequences as having a conservator of the estate appointed. For example, a person for whom a conservator of the estate is appointed does not have the capacity to enter into a contract. Probate Code §1872(a).

ILLUSTRATIONS:

An elderly settlor of a trust is also the trustee, has the sole power to revoke the trust, and during the settlor’s life is the sole beneficiary. The settlor’s children are concerned because the settlor has been spending tens of thousands of dollars purchasing lottery tickets in response to solicitations advising the settlor in large type that the settlor has won millions of dollars and in small type “if you have the winning ticket.” All of the settlor’s assets are held in trust. The children could petition the court to appoint a conservator for their father. The appointment of a conservator will cause a vacancy in the office of trustee of his trust under Probate Code §15643(e). But the children may be deterred from doing so because of the humiliation their father may suffer from such an appointment and the intrusive nature of conservatorship proceedings. Under current Probate Code §15642(b)(2), the children also could petition to remove their parent as trustee on the grounds that the settlor is “otherwise unfit” to serve. But that standard is vague and lacks the standards and protections available under Probate Code §§810 - 813. Under the proposed legislation, the children could petition on the ground that the settlor, as determined under Probate Code §§810 - 813, is substantially unable to manage the trust’s financial resources or to resist fraud or undue influence, standards with which most courts are familiar from conservatorship cases.

¹ Pub. L. 104-91, 110 Stat. 1936, the regulations are found at www.hhs.gov/ocr/regtext.html.

² Civil Code §56 et seq.

DOCUMENTATION:

An article in the California Trusts and Estates Quarterly recently suggested that estate planners use the same standard in their trust instruments as a ground for removal. Horton, *Looking at Medical Privacy Rules from an Estate Planner's Perspective*, 9 California Trusts and Estate Quarterly, Issue 4, 5, at p. 12 (Winter 2003).

HISTORY:

Probate Code §15642 was enacted in 1990 (Stats. 1990, c. 79 (A.B. 759), §14, operative July 1, 1991, and amended in 1993, c. 293 (A.B. 21) §6, and 1995, c. 730 (A.B. 1466) §9.

PENDING LITIGATION:

None known.

FISCAL IMPACT:

None anticipated.

LIKELY SUPPORT/OPPOSITION:

The State Bar of California Trusts and Estates Section will support this legislation. There is no known opposition.

GERMANENESS:

The growth of trusts as an estate planning device and the ability of trust beneficiaries to remove trustees who no longer are fit to serve is a matter of concern to estate planners. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT AND COMMENTS:

SECTION 1. Section 15642 of the Probate Code is amended to read:
15642. (a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.
(b) The grounds for removal of a trustee by the court include the following:
(1) Where the trustee has committed a breach of the trust.
(2) Where the trustee is insolvent or otherwise unfit to administer the trust.
(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.
(4) Where the trustee fails or declines to act.
(5) Where the trustee's compensation is excessive under the circumstances.

(6) Where the sole trustee is a person described in subdivision (a) of Section 21350, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

(A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

(B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and have counseled my client,
(name of instrument)

_____, fully and privately on the nature and
(name of client)

legal effect of the designation as trustee of _____
(name of trustee)

contained in such instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and such intent is not the product of fraud, menace, duress, or undue influence.

(Name of Attorney)

(Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(C) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(7) Where, as determined under Part 17 of Division Two of the Probate Code, the trustee is substantially unable to manage the trust's financial resources or is otherwise unable to execute properly the duties of the office.

(8) Where the trustee is substantially unable to resist fraud or undue influence.

~~(7)~~ (9) For other good cause.

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.